UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CASE NO. 07 Civ. 4113 (LLS)

CHINESE AUTOMOBILE DISTRIBUTORS OF AMERICA, LLC, a limited liability company, individually and, with respect to certain claims, in a derivative capacity,

Plaintiff,

v.

MALCOLM BRICKLIN, an individual; **JONATHAN BRICKLIN**, an individual; **BARBARA BRICKLIN JONAS**, an individual; **MICHAEL JONAS**, an individual; **SANIA TEYMENY**, an individual; **SCOTT GILDEA**, an individual; and **VISIONARY VEHICLES, LLC**, a limited liability company;

Defendants.

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DEFENDANTS MOTION TO DISQUALIFY
McCARTER & ENGLISH, LLP

Defendant, VISIONARY VEHICLES, LLC, ("VV"), MALCOLM BRICKLIN, JONATHAN BRICKLIN, BARBARA BRICKLIN JONAS, MICHAEL JONAS and SANIA TEYMENY, (collectively, referred to as "Defendants"), by and through the undersigned counsel, hereby move to disqualify McCarter & English, LLP from representing Plaintiff, CHINESE AUTOMOBILE DISTRIBUTORS OF AMERICA, LLC, ("CADA"). The grounds in support of this motion are as follows:

STATEMENT OF THE CASE

This Motion is brought to disqualify the law firm of McCarter & English, LLP (the "McCarter firm") from representing CADA in this action because of a conflict of interest arising under Canons 4, 5 and 9, and corresponding Disciplinary Rules DR 5-108 (A)(1) [22 NYCRR § 1200.27 (A)(1)] and DR 5-105 (D) [22 NYCRR § 1200.24 (D)] of the Code of Professional Responsibility (the "Code"). In the Second Circuit, the American Bar Association Code of Professional Responsibility prescribes the appropriate guidelines for professional conduct of the bar. NCK Org., Ltd. v. Bregman, 542 F.2d 128, 130 n.2 (2d Cir. 1976); *See also* Local Civil Rule 1.5 (grounds for attorney discipline include conduct in violation of the New York State Code of Professional Responsibility as adopted from time to time by the Appellate Divisions of the State of New York).

Although the law of the Second Circuit disfavors disqualification of counsel (*See:* Guerilla Girls, Inc. v Kaz, 2004 U.S. Dist LEXIS 19969 (S.D.N.Y. 2004) by a learned Judge of this Court), the McCarter firm has an irreconcilable conflict because Howard Berkower, Esq. ("Berkower"), a partner in the McCarter firm, previously represented VV in a number of legal matters over a two (2) year period immediately overlapping the commencement of this lawsuit and received virtually all of VV's confidential information, much of which is the subject of this lawsuit. Thus, the McCarter firm must be disqualified because the firm cannot thereafter represent CADA in this matter in which CADA's interests are materially adverse to the interests of VV, the former client.

The Defendants herein have filed three (3) Affidavits in support of their Motion to Disqualify. The Affidavit of Malcolm Bricklin and Michael Jonas outline the attorney-client relationship and the scope of Howard Berkhower's representation of VV. The third Affidavit of Barbara Engelke explains and identifies the document management and retention program currently used at the McCarter and English firm, enabling every attorney at every office at the McCarter firm to access any document or email prepared by, sent by or received by anyone at the McCarter firm.

According to the Bricklin and Jonas affidavits, the McCarter firm neither sought nor received VV's consent to a waiver of this conflict. Further, the McCarter firm never notified the Defendants that Howard Berkower, Esq. had joined the McCarter firm, nor has the McCarter firm provided the Defendants with any notification of any screening process to protect the Defendants' confidential information obtained by Howard Berkower, Esq.

In January, 2008 the Defendants made a written request upon the McCarter firm to withdraw from this litigation and they have refused.

STATEMENT OF FACTS

Based upon the Affidavits filed in support of the Motion to Disqualify, Howard Berkower in his former capacity as a partner of the law firm of Zukerman, Gore and Brandeis LLP, was initially retained by VV commencing on February 6, 2006. He was again retained in March, 2007 and performed legal services for VV through May, 2007. (*See*: Bricklin Affidavit) Berkhower was still counsel of record for VV until November, 2007. At all times Mr. Berkower was the primary attorney and point of contact, handling the file on behalf of VV at the law firm of Zukerman, Gore

& Brandeis, LLP. Mr. Berkower handled substantially all of the aspects of the legal services rendered by the law firm on behalf of VISIONARY VEHICLES, LLC. Mr. Berkower provided all of the legal services in connection with the transfer of assets and liabilities from VISIONARY VEHICLES, LLC to VISIONARY VEHICLES, INC. (See: Bricklin and Jonas Affidavits) As part of his participation, Mr. Berkower was privy to the intimate details of the business enterprises, including, but not limited to: the Company's assets, liabilities, debts, creditors, employees and their compensation, expenses, business plans, marketing strategies, dealer contracts, dealer territories and equity funding, as well as the ongoing negotiations between the Company and potential dealers and investors. (*See*: Bricklin and Jonas Affidavits).

One of Mr. Berkower's responsibilities was to prepare a revised Private Placement Memorandum ("PPM") for the dealers who were investing and a revised PPM for the non-dealer investors. (*See*: Bricklin and Jonas Affidavits).

The chronology of the Plaintiff's second $2 million investment in VV occurred as follows: On February 9, 2006, Mr. Berkower prepared and delivered to the company his initial draft of the revised Private Placement Memorandum. On February 21, 2006, VV executed a promissory note in favor of the Plaintiff in the amount of One Million and no/100 ($1,000,000.00) Dollars. On March 17, 2006, VV executed a promissory note in favor of the Plaintiff in the amount of an additional One Million and no/100 ($1,000,000.00) Dollars. True and correct copies of the Promissory Notes are attached hereto as EXHIBIT 1 and incorporated herein by reference.

The Plaintiff's representatives, particularly David Rothrock, reviewed the PPM prepared by Berkower, before the Plaintiff made its second Two Million and no/100 ($2,000,000.00) Dollar investment on February 21, 2006 and March 17, 2006 (*See*: Bricklin Affidavit), the very fund-raising effort that is the subject of the securities fraud count of the instant Amended Complaint, the only Federal subject matter count of the Plaintiff's Complaint. (See the Amended Complaint ¶¶ 27-29).

Mr. Berkower had a direct knowledge (or was privy to) the intimate details of the business enterprises, including, but not limited to, the company's assets, liabilities, debts, creditors, employees and their compensation, expenses, business plans, marketing strategies, dealer contracts, dealer territories, equity funding, as well as the ongoing negotiations between the company and potential dealers and investors. (See: Bricklin and Jonas Affidavits).

Further, Mr. Berkower worked closely with VV's CEO, MALCOLM BRICKLIN, VV's Financial Controller, Marybeth Higgins, VV's consultant, MICHAEL JONAS and Atlantic Pacific Capital, an investment banking firm retained by VV to assist it in this fundraising effort. It was Atlantic Pacific Capital that introduced and recommended VV retain Mr. Berkower.

In his role as legal counsel to VV, Mr. Berkower frequently communicated with the above-mentioned persons via access to the "vvcars.com" email server. By the end of his engagement with VV there were more than five hundred (500) emails that were either from, to or made reference to Mr.Berkower in the body of the email. (See: Jonas Affidavit). The various telephone and email communications were privileged, confidential, and sensitive materials, and not readily available to the public. Defendants will make these emails available for the Court's in-camera inspection.

The second part of Mr. Berkower's engagement, involved his direct and active participation with both VV and with the senior management of VISIONARY VEHICLES, INC. (hereinafter referred to as the "INC."), a separate corporation that was acquiring many of the assets of VV. Berkhower was also instrumental in participating in the engagement of St. Heliers to assist VV in raising capital. (See: Bricklin and Jonas Affidavits).

Berkower coordinated with outside consultants and was responsible for preparing all of the documentation supporting INC.'S formation and the transfer of certain assets of VV to INC., and the assumption of certain VV liabilities by INC. (See: Bricklin and Jonas Affidavits).

It is these assets, in part, that the Plaintiff, through the McCarter firm, would have to try to reach in the unlikely event they obtain a judgment herein. In this capacity, Mr. Berkower was again made aware of all of the confidential financial information of VV and many other privileged matters.

According to the Affidavit of Michael Jonas, Mr. Berkhower devoted a substantial amount of his time performing services on behalf of VV, especially during February, 2006. During the first month of Mr. Berkhower's engagement, Mr. Berkhower billed for 47.70 hours of his time and his firm billed VV the total amount of $24,120.25 for services rendered in the month of February, 2006. From March, 2006 through May, 2006, Mr. Berkhower billed for 35 hours of his time and his firm billed VV the total amount of an additional $19,946.04. All tolled, Mr. Berkhower's firm billed VV a total amount of $97,674.57 for services rendered to VV and INC, primarily by Mr. Berkhower from February, 2006 through May, 2007. The billing records contain privileged and confidential information. The Defendants will make the billing records available for in camera inspection by the Court.

Thus, in his role as legal counsel and based upon the attorney-client privilege, for over two (2) years, in part concurrent with the filing of this lawsuit, Mr. Berkower was intimately privy to all of VV's confidential, financial and business information.

In October, 2007, Mr. Berkower left the firm of Zukerman Gore and Brandeis LLP to join the McCarter firm, the attorneys representing the Plaintiff in this case, adverse to VV in this matter. *See*: Business Wire Article dated November 6, 2007 announcing that Berkhower has joined the McCarter firm, attached hereto as EXHIBIT "2" and incorporated herein by reference.

Mr. Berkower never notified the Defendants of his move to the McCarter firm and the McCarter firm never informed Defendants counsel, or this Court. Counsel for Plaintiff acknowledged at the pre-motion conference that Mr. Berkower disclosed the fact that he represented VV when he joined the McCarter firm, and nothing was done until VV learned of and informed the McCarter firm of Mr. Berkower's conflict in late January, 2008.

Further, it has been ten (10) months since Mr. Berkower has joined the McCarter firm, and the McCarter firm has not provided VV, VV's counsel, or this Court with any information on how they are protecting the former clients' confidences.

ARGUMENT

I. The McCarter Firm Should be Disqualified due to an Irreconcilable Conflict of Interest

In light of the prior substantially related legal representation of VV by a current partner of the firm, the McCarter firm's representation of Plaintiff violates Canons 4, 5, and 9 of the Code of Professional Responsibility. These Canons, and the Disciplinary Rules enacted thereunder, operate in conjunction to disqualify a law firm from representing a party to a litigation where, as here, one of the firm's partners or associates previously represented an adverse party in substantially related matters. Furthermore, disqualification cannot be avoided through the use of screening mechanisms if, there is a substantial conflict as is the case here,; or the tainted attorney will continue to work in proximity with the attorneys handling the litigation, as is the case here, and thus there is a discernable risk that screening measures may not be one hundred (100%) percent effective.

A district court is responsible for supervising the members of its bar. In performing this task, district courts within the Second Circuit consult the guidelines for professional conduct set forth in the Code. *See, e.g.*, Bennett Silvershein Assoc. v. Furman, 776 F. Supp. 800, 803 (S.D.N.Y. 1991) (Mukasey, J.) ("This Circuit has reviewed attorney disqualification motions under Canon 4 of the Model Code of Professional Responsibility"). The Code contains Canons, Ethical Considerations and Disciplinary Rules. The Canons are statements that generally express the standards of conduct expected of attorneys in their interactions with the public and involvement with the legal system. The Ethical Considerations represent the aspirations toward which all lawyers should strive. Finally, the Disciplinary Rules are pronouncements of the minimum level of conduct below which no attorney can practice without becoming subject to disciplinary action. *See*: Code of Professional Responsibility, Preliminary Statement (29 McKinney 1992).

Ethical Canons 4 and 5 address the protection of client confidences. Canon 4 provides that "A lawyer should preserve the confidences and secrets of a client." Canon 5 provides that "A lawyer should exercise independent professional judgment on behalf of a client." A corresponding Disciplinary Rule DR 5-108(A)(1) [22 NYCRR § 1200.27(A)(1)] provides, in pertinent part:

> A. Except…with respect to…government lawyers, a lawyer who has represented a client in a matter shall not, without the consent of the former client after full disclosure:
>
> 1. Thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client.

In the instant case, neither Berkower nor the McCarter firm, ever notified the Defendants or this Court, that Berkower joined the McCarter firm. In addition, as stated in the Bricklin Affidavit, these Defendants have never consented to Berkower or his new firm representing clients with interests that are directly adverse to the Defendants. Generally, the rule against successive representation "concerns itself with the unfair advantage that a lawyer can take of his former client in using adversely to that client information communicated in confidence in the course of the representation," including "knowing what to ask for in discovery, which witnesses to seek to depose, what questions to ask them, what lines of attack to abandon and what lines to pursue, what settlements to accept and what offers to reject." *Ulrich v. Hearst Corp.*, 809 F. Supp. 229, 236 (S.D.N.Y. 1992) (Leval, J.).

Representation of a client who is adverse to a former client may also violate Canon 9, which admonishes lawyers to avoid even the appearance of impropriety. *Cheng v. GAF Corp.*, 631 F.2d 1052, 1055-1056, 1059 (2d Cir. 1980), vacated on other grounds, 450 U.S. 903, 101 S. Ct. 1338 (1981); *Marshall v. New York State Div. of Police*, 952 F. Supp. 103, 112 (N.D.N.Y. 1997) (in addition to conflict of interest, facts also establish unacceptable appearance of impropriety under Canon 9).

The prohibition on representing a client adverse to the interests of a former client extends to the tainted attorney's entire law firm. DR 5-105(D) provides, in relevant part:

> While lawyers are associated in a law firm, none of them shall knowingly accept or continue employment when any one of them practicing alone would be prohibited from doing so under...DR 5-108(A) ...except as otherwise provided therein. N.Y. Jud. Law § DR 5-105(D) (McKinney 1992).

The adjudication of such matters, the Second Circuit has held, requires the district court to resolve "any doubts . . . in favor of disqualification." *See*, *Kara Holding Corp. v. Getty Petroleum Mktg. Inc.*, 2002 U.S. Dist. LEXIS 13460, No. 99 Civ. 0275, 2002 WL 1684365 at 3 (S.D.N.Y. Jul 24, 2002); *Crudele v. N.Y. City Police Dept*, 2001 U.S. Dist. LEXIS 13779, No. 97 Civ. 6687, 2001 WL 1033539, at 2 (S.D.N.Y. Sept. 7, 2001); *Felix v. Balkin*, 49 F. Supp. 2d 260, 267 (S.D.N.Y.1999).

Courts in this Circuit have frequently disqualified both the attorney with the conflict and the law firm at which that attorney works upon finding a violation of Canons 4, 5 and/or 9. *See*, NCK

Organization, Ltd. v. Bregman, 542 F.2d 128, 129 (2d Cir. 1976) (affirming disqualification of counsel for ethical violations under Canons 4 and 9); In re Manshul Constr. Corp., No. 97 Civ. 4295, 1998 WL 405039, at 6 (S.D.N.Y. July 20, 1998) (Batts, J.) (disqualification warranted under Canon 9 based on possibility that attorney, in her new representation against former client, may improperly use confidences gained in her representation of former client to his detriment); *Rosman v. Shapiro*, 653 F. Supp. 1441, 1446 (S.D.N.Y. 1987) (Sprizzo, J.) (disqualification of attorney based on "appearance of impropriety is so great, the Court in the exercise of its supervisory powers cannot allow the situation to go uncorrected"); *See also*, *Solow v. W.R. Grace & Co.*, 83 N.Y.2d 303, 309, 610 N.Y.S.2d 128, 131 (1994) (considering disqualification of attorney for violation of Code of Professional Responsibility DR 4-101, DR 5-108 and Canon 9); *Alicea v. Angelina Bencivenga*, 270 A.D.2d 125, 704 N.Y.S.2d 578 (1st Dep't 2000) (relying on New York Code of Professional Responsibility DR 5-108(A) to disqualify counsel); *In the Matter of Walden Federal Sav. & Loan Assoc.*, 212 A.D.2d 718, 719, 622 N.Y.S.2d 796, 797 (2d Dep't 1995).

In the instant case, these Defendants have a *bona fide* concern that materially privileged and confidential information conveyed in confidence to their attorney and directly related to the issues in this case, will be (or has been) conveyed to the adverse party through the Defendants' former attorney Mr. Berkower. In sum, consistent with the Code, State and Federal Courts in New York the Court should use disqualification as a way to insure that a party is not subjected to any unfair disadvantage when one of its former lawyers joins a firm representing an adversary.

A. The Three Prong Substantial Relationship Test Is Met.

The McCarter firm's representation of Plaintiff falls squarely within the prohibitions of Canons 4, 5 and 9. The Canons are intended to prevent specifically the scenario that exists in this case: a party to a litigation facing the possibility of its defense being severely compromised by an opposing counsel who was privy to privileged and confidential information learned in the course of a prior attorney-client relationship.

Consistent with DR 4-101(B), the courts in this Circuit have applied the following three-part test to determine whether representation of a client that is adverse to a former client violates Canon 4:

(1) The moving party is a former client of the adverse party's counsel;

(2) There is a substantial relationship between the subject matter of the counsel's prior representation of the moving party and the issue in the present lawsuit; and

(3) The attorney whose disqualification is sought had access to, or was likely to have access to, relevant privileged information in the course of his prior representation of the client.

See, Evans v. Artek Sys. Corp., 715 F.2d 788, 791 (2d Cir. 1983); Guerilla Girls, Inc. v Kaz, 2004 U.S. Dist LEXIS 19969 (S.D.N.Y. 2004) (Stanton, J.); Loomis v. Consol. Stores, Corp., No. 98 Civ. 8735, 2000 U.S. Dist. LEXIS 12391, at 6 (S.D.N.Y. Aug. 29, 2000) (Sweet, J.); Red Ball Interior Demolition Corp. v. Palmadessa, 908 F. Supp. 1226, 1239 (S.D.N.Y. 1995) (Sweet, J.); United States Football League v. National Football League, 605 F. Supp. 1448, 1452 (S.D.N.Y. 1985) (Leisure, J.).

Howard Berkower was initially retained by VV for almost a year commencing on February 6, 2006. During his first month as VV's counsel, Berkhower billed for 47.70 hours of his time. (See: Jonas Affidavit). He was again retained in March, 2007 and performed legal services for VV and INC. until May, 2007, and remained Counsel of record until October, 2007, which is about the same time that he joined the McCarter firm. McCarter filed this lawsuit in May, 2007 while Berkhower was still VV's and INC's attorney of record. Although at first he was a member of the Zukerman Gore and Brandeis firm, he joined the McCarter firm in October, 2007, approximately six (6) months after this lawsuit was filed. Berkhower has now been with the McCarter firm for more than ten (10) months. Both he and other members of the Zukerman firm actively represented VV and consulted with virtually all of VV's senior executives on a regular basis. During the first engagement, Berkower prepared the Private Placement Memorandum and supporting documents to be used in VV's capital formation effort. Berkower assisted VV in drafting financial agreements, and also acted as litigation counsel and reviewed the status of litigations conducted out of state by other counsel. (See: Bricklin and Jonas Affidavit).

VV officials had privileged discussions regarding all their legal matters with Berkower. VV officials discussed finances, strategy, competition, employment matters, and virtually everything related to VV's business with Berkower in a confidential manner that they believed was protected by the attorney-client privilege. (See: Bricklin and Jonas Affidavit). Further, the Private Placement Memorandum drafted by Berkower was the basis for the fundraising about which the Plaintiff complains in their Securities Fraud count of the instant Amended Complaint.

During his engagement, Berkower also created the documentation supporting VV's transfer of certain assets to INC., together with the assumption of certain VV liabilities by INC., and was involved in numerous matters at issue in this case. (See: Bricklin and Jonas Affidavit). Berkower even drafted the Private Placement Memorandum which VV used in its capital formation effort. Throughout the course of two (2) years representing VV and INC., Berkower was privy to all privileged discussions with VV's senior management about exactly the same matters which are at issue in this litigation - the confidential business and product development plans of VV.

The facts of this case clearly establish that Berkower, and through him the McCarter firm, have intimate knowledge of the important confidential information regarding VV's tactics and strategy in connection with the transfer of the assets, confidential business and product development plans, and of VV's possible approach to settlement of such conflicts, gained through privileged communications between Berkower, VV and INC. VV has the right "to be free from any apprehension that privileged matters disclosed to an attorney will subsequently be used against it in related litigation.

It is not necessary for a party seeking disqualification to show that confidential information necessarily will be disclosed in the course of the litigation; rather, a reasonable probability of disclosure should suffice." Jamaica Public Service Co. v. AIU Insurance Co., 92 N.Y.2d 631 at 637 (Ct. App., 1998).

Since there is no question that Berkower expended a substantial amount of time representing VV, and that he was privy to confidential and privileged communications in the course of that representation, the only question for purposes of determining whether Canon 4 is implicated here is, whether there is a "substantial relationship" between the subject matter of Berkower's prior representation of VV and the issues raised in the current lawsuit.

The courts are particularly inclined to find the "substantial relationship" test satisfied where, by virtue of the prior relationship, the attorney became privy to confidential information or knowledge which provides a litigation advantage that would not otherwise be available. *See*, Bennett Silvershein Assoc. v. Furman, 776 F. Supp. 800, 804 (S.D.N.Y. 1991) (Mukasey, J.) (matters are substantially related if the attorney gained an advantage from a prior relationship otherwise not available, **even if the advantage only concerned background issues**).

In Ullrich v. Hearst Corp., 809 F. Supp. 229 (S.D.N.Y. 1992), an attorney was disqualified from representing three former Hearst employees in their employment discrimination claims against the company, based on the court's determination that the attorney's former representation of Hearst afforded him "continuous access" to confidential information that was closely linked to issues that were relevant to the current employment discrimination litigations. Id. at 233. Specifically, the court found that even though the attorney did not handle any claims involving the three plaintiffs, he had extensive experience with Hearst's performance evaluation process, and thus, had knowledge of general performance levels of other employees against whom plaintiffs would be measured. The court concluded that this experience presented a "clear likelihood that confidential information imparted to the attorney by the former client will be used against the interests of [the] former client," and thus, required disqualification. Id. at 236.

Similarly, in Red Ball Interior Demolition Corp., 908 F. Supp. at 1244, the Court was concerned with preventing the use of insights gained by counsel through his previous representation of an adverse party. In that case, a civil action for breach of fiduciary duty, the attorney (Horwitz) was disqualified from representing defendant Palmadessa because he had previously represented plaintiff Red Ball in a criminal proceeding. Although the court recognized that the questions of law and fact were different in the civil action and the criminal proceeding, it found disqualification was proper because the witnesses, testimony, and other evidence relevant to each action were likely to overlap. Furthermore, the court stated, "even taking [defendant's] contentions that Horowitz gained no knowledge during his past representation of Red Ball as true, the fact that Horowitz had at least some access to such facts and witnesses presents enough of an appearance of a conflict of interest to meet the successive representation test and to warrant disqualification." Id. at 1245. *See also,* Fernandez v. City of New York, No. 99 Civ. 0777, 2000 U.S. Dist. LEXIS 3503, at 3-4 (S.D.N.Y. Mar. 21, 2000) (Chin, J.) (law firm disqualified from representing plaintiff in false arrest and malicious prosecution case because there was a reasonable likelihood that firm's earlier representation of defendant in investigation by Internal Affairs Bureau of off-duty employment by defendant resulted in acquisition of confidential information and could be useful to plaintiff).

These decisions demonstrate that the substantial relationship test is readily satisfied here because, as a senior-level attorney for VV, Berkower, himself and not an associate, became intimately familiar with information that will have a direct bearing on the outcome of the securities fraud claims and corporate waste claims which are being alleged against the Defendants in the present case.

Moreover, the new allegations raised in Plaintiff's Amended Complaint suggest that the Plaintiffs may have already been provided with confidential information. Either the Plaintiff had an "epiphany" between the filing of its initial Complaint and the Amended Complaint, one year later. Or the Plaintiff has been provided with confidential information from an unknown source. The nature and specificity of statements in the Amended Complaint which was filed by the McCarter Firm on behalf of the Plaintiffs in May, 2008, demonstrate the intimate understanding of the confidential legal tactics and strategies as well as knowledge of the specific facts which, while not sufficient to overcome this Courts Order of Dismissal, attempt to provide what is necessary under the Federal Rules in order to properly plead a securities fraud claim. See the Private Securities Litigation Reform Act of 1995 ("PSLRA" (15 U.S.C. § 78u-4(b) and Fed. R.Civ. P. 9(b) (stating the requirement that the securities fraud claim should be pled with sufficient particularilty. This Court, dismissed the initial fraud Complaint for failure to plead the facts showing the alleged representations were false and misleading and for also failing to establish loss causation. Importantly, the initial Complaint was filed on May 24, 2007 before Berkower's engagement by the McCarter Firm, and while Berkhower was still performing legal services for VV. The fraud count in the Amended Complaint identified new facts, such as a different time period during which the alleged representations were made. It is important to note that this new time period has now been re-drafted to allege certain acts of the Defendants through March 2006; which is the exact time

Berkower represented the Defendant on the same issues. This and other facts and allegations of the Securities counts that were absent from the initial Complaint, such as multiple references to the Importation and Distribution Agreement with Bondy (Wuhu) Trade Company, (See ¶15,16) raise a bona fide concern that confidences were already shared by Berkower with the McCarter Firm regarding his intimate knowledge of VV and the facts which he was himself a part of, and which are at the core of the fraud count of the Amended Complaint.

The Private Placement Memorandum and Subscription Agreements that Berkower drafted were used to solicit and close the Plaintiff's investments, the very investments they claim were fraudulently induced. Assuming this case goes to trial, there is a substantial likelihood that Mr. Berkower will have to be a witness regarding his representation of VV in the Private Placement Memorandum and other matters directly related to his representation of the Defendants. Further, Berkower may be a witness regarding his knowledge of the assets and to refute the allegations of wasteful expenditures by Mr. Bricklin and how he characterized these matters in the Private Placement Memorandum and other documents he prepared.[1] As discussed more fully above, in the course of over hundreds of hours spent representing VV in the two years immediately preceding joining the McCarter firm, Berkower became fully familiar with virtually all aspects of the operations of VV, including the procedures, trade secrets and attempts to protect them, its litigation practices, its financial situation and its attitude toward settlement, which is certainly material to this litigation.

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[1] In Renner v. Townsend Fin. Servs. Corp., the court found that in determining whether an attorney ought to be disqualified from an action due to his role as a witness, the test the court must apply "is whether the attorney's testimony could be significantly useful to his client. If so, he should be disqualified regardless of whether he will actually be called." Renner v. Chase Manhattan Bank, 2002 U.S. Dist. LEXIS 8898 (S.D.N.Y. 2002), *quoting* Lamborn v. Dittmer, 873 F.2d 522, 531 (2d Cir. 1989). In Renner, the attorney and law firm were disqualified from further representation of the defendants upon the finding that defense counsel's testimony was necessary to lay predicate for civil fraud, which satisfied requirement of prejudice, and therefore passed the strict scrutiny test. *Id.*

It is our belief, however, that the case for disqualification presented in this motion is so strong that it is not necessary to expand upon the additional attorney-witness argument.

Moreover, having obtained information in the course of attorney-client privileged communications, Berkower's knowledge includes confidential information that would not otherwise be discoverable, and thus could significantly compromise VV's defense. For example, Berkower would be able to offer Plaintiff strategies on how to proceed on the fraud, negligent misrepresentation and misappropriation of funds Counts because he participated in drafting all of the detailed business documents and business plans that would otherwise not be subject to discovery. Thus, Berkower is in a position where he is privy to confidential information that could serve to challenge the credibility of the accusations; to prepare cross-examination; and to otherwise seek to challenge explanations of management determinations that are at issue. In a more general sense, as a senior member of VV's legal team, Berkower has had numerous confidential and privileged communications with several of the principal decision makers within VV, during which he became privy to their strategic thinking on litigation issues such as settlement, discovery, business acquisition and transfer of assets. On the basis of those communications, he can reach informal judgment, in advance, regarding the effectiveness of contemplated strategies and can anticipate VV's reactions to them. This acquired knowledge thus likewise creates the risk of unfair advantage that Canons 4 and 5 were designed to prevent.

It is not even necessary to show decisively that confidences have been obtained: the inference is sufficient. In the previously mentioned case of Walden Federal Savings and Loan Ass'n v. Village of Walden, 622 N.Y.S.2d 796 at 797 (2d Dep't, 1995), where the law firm, some of whose members drafted a Village's building code provisions, sought to represent a party challenging those provisions, the Second Department disqualified the entire firm holding that "when ... it is reasonable to infer that the firm gained some confidential information during its former representation of the former client which is of value to its present client, disqualification is justified on the basis of the mere appearance of impropriety." Id.

To summarize, the similarity and overlap between the issues confronted by Berkower in his prior representation of VV, and those issues that will be, or likely will be, confronted in this lawsuit, satisfy the "substantial relationship" test. Simply put, Berkower possesses more than just general information about VV: its employees; its finances; its business plans; its managers; its operations; and its policies that an adversary has no right to know.

II. NEITHER THE DEFENDANTS NOR THIS COURT WERE TIMELY INFORMED THAT AN ETHICAL SCREEN WAS RAISED OR IMPLEMENTED BY THE MCCARTER FIRM; AND A SCREEN IS NOT APPROPRIATE IN THIS CASE.

Pursuant to Code Canon 5, Disciplinary Rule 5-105(D), the conflict of a single attorney may be imputed to the attorney's entire firm. However, Rule 5-105 does not establish a "*per se* rule of disqualification based upon imputed confidences" because such a rule "would create unnecessarily preclusive and indiscriminate restraints upon an entire law firm, regardless of whether they have knowledge of a former client's confidences." Lott v. Morgan Stanley Dean Witter & Co. Long-Term Disability Plan, 2004 U.S. Dist. LEXIS 25682 (S.D.N.Y. Dec. 23, 2004)). The imputation rule is based upon the belief that when attorney-client confidences are disclosed to a member of the law firm, every other attorney in the law firm has the opportunity to ascertain the information gleaned from the disclosure. This presumption, however, **may be** rebutted when one attorney "screens" the rest of the attorneys from the disclosure. *See*: *Am. Law Inst. Rest.* (Third) *of the Law Govern' Lawyers*, 124

A. As noted above, "former client" conflict situations often arise from the lateral movement of attorneys between firms. Under the doctrine of imputed or shared knowledge, one law firm member's prior representation of an adverse party in a substantially related matter necessitates the disqualification of the entire firm. Atasi Corp. v. Seagate Tech., 847 F.2d 826, 829-30, 6 U.S.P.Q.2d 1955, 1956-57 (Fed. Cir. 1988) (applying Ninth Circuit law to affirm disqualification of entire firm due to existing "of counsel" attorney conflicts); Cobb Publg., Inc. v. Hearst Corp., 907 F. Supp. 1038 (E.D. Mich. 1995) (disqualifying entire firm for failure to promptly comply with ethical rules regarding attorney screening).

B. In such a situation, the tainted attorney is presumed to have shared client confidences with his new colleagues, and thus has "infected" his or her new firm with the conflict. *Id.* at 1045. In some jurisdictions, the firm can rebut the presumption by establishing that "specific institutional screening mechanisms have been implemented to effectively insulate against any flow of confidential information from the quarantined attorney to other members of his present firm." *Id.*

Factors to be considered in evaluating the sufficiency of any ethical screen vary from jurisdiction to jurisdiction, but may include:

> The size and structural divisions of the law firm involved, the likelihood of contact between the infected attorney and the specific attorneys responsible for the present representation, the existence of rules which prevent the infected attorney from access to relevant files or other information pertaining to the present litigation or which prevent him from sharing in the fees derived from such litigation . . . and the specific institutional mechanisms to block the flow of confidential information.

The screening procedure must be both demonstrably effective and timely. *See:* *Lott and Cobb, supra*. Delay in the implementation of a screening process or "Chinese Wall" for as little as two weeks has been held to violate applicable conflicts of interest prohibitions. *Cobb Publg.,* 907 F. Supp. at 1045. Moreover, an otherwise proper screen may nevertheless be regarded as ineffective if the attorney's or firm's prior involvement was "substantial." *See e.g.*, *Smith & Nephew, Inc. v. Ethicon, Inc.*, 98 F. Supp. 2d 106, 111 n. 10 (D. Mass. 2000) (disqualifying Fish & Richardson ("F&R") from representing the plaintiff in its action claiming ownership of patents it contends it owns pursuant to the inventor defendants' employment agreements with the plaintiff's predecessor, despite the "impervious" screen F&R established to wall off the inventors' former attorney, now "of counsel" with F&R, where the attorney had negotiated the employment agreements at issue).

This Circuit found that screening would be sufficient where: "There is no substantial risk that confidential information of the former client will be used with material adverse effect on the former client because: (a) any confidential client information communicated to the personally prohibited lawyer is unlikely to be significant in the subsequent matter; (b) the personally prohibited lawyer is subject to screening measures adequate to eliminate participation by that lawyer in the representation; and (c) ***timely and adequate notice of the screening has been provided to all affected clients***." [Emphasis supplied]. *See*, Lott v. Morgan Stanley Dean Witter & Co. Long-Term Disability Plan, 2004 U.S. Dist. LEXIS 25682 (S.D.N.Y. Dec. 23, 2004)); *See also* 61 The Record 332 FORMAL OPINION 2006-2: DUTIES TO PROSPECTIVE CLIENTS: THE COMMITTEE ON PROFESSIONAL AND JUDICIAL ETHICS (the emphasis is made on the timeliness of the screening).

An affected client will usually have difficulty demonstrating whether screening measures have been honored. Timely and adequate notice of the screening must therefore be given to the affected clients, including description of the screening measures reasonably sufficient to inform the affected client of their adequacy. Notice will give opportunity to protest and to allow arrangements to be made for monitoring compliance. *Restatement of the Law, Third, The Law Governing Lawyers Copyright (c) 2000, The American Law Institute.* (iii).Screening--timely and adequate notice of screening to all affected clients.

Notice should ordinarily be given as soon as practical after the lawyer or firm realizes or should realize the need for screening. Here, however, not only has the McCarter firm failed to implement any adequate screening procedures, they have never provided timely and adequate notice of any screening procedures to their former client VV, or to this Court.

In the instant case, the Plaintiff has not notified the Defendants or the Court of the implementation of any screening procedures. During the pre-motion hearing, Counsel for Plaintiff acknowledged that Mr. Berkower disclosed the fact the he represented VV when he joined the McCarter Firm in October, 2007 (see attached Exhibit 2 article with the date of his hire). The McCarter Firm brought the lawsuit against the Defendant on May 24, 2007, while Berkhower was still performing services for VV. Therefore the McCarter firm knew the need for screening as early as October, 2007 and that is when the McCarter Firm was required to provide VV and/or this Court with the notice of the adequacy of screening, including description of the screening measures reasonably sufficient to inform the affected client of their advocacy. More than ten months have passed since the disqualifying event occurred and absolutely no notice of screening measures have been presented. Such delay is not reasonable.

Additionally, when after a number of months of Berkower's engagement by the McCarter Firm, VV found out that Berkower was hired by the McCarter Firm from other sources, VV's counsel confronted Berkower and requested that the McCarter Firm withdraw from this litigation, they have refused. As of the filing of this Motion, neither VV nor VV's counsel were given the required notice, which is an ethical violation. According the New York Rules of Ethics, a lawyer or law firm are subject to sanctions (Suspension) when found in violation of the Disciplinary rules.

Rule DR 1-102 (a) (4) (22 NYCRR 1200.3 [a] [4])--engaging in conduct involving dishonesty, fraud, deceit or misrepresentation;

DR 1-102 (a) (5) (22 NYCRR 1200.3 [a] [5])--engaging in conduct that is prejudicial to the administration of justice;

DR 1-102 (a) (7) (22 NYCRR 1200.3 [a] [7])--engaging in conduct that adversely reflects on his fitness as a lawyer; In Matter of Lazroe, 2006 NY Slip Op 9935 (N.Y. App. Div. 4th Dep't 2006), an attorney was suspended from the practice of law for a period of six months, where the attorney failed to disclose to his former client the potential conflict of interest arising from his continued representation of the adverse party and failed to obtain the consent of the former client to the continued representation of the adverse party.

DR 5-105 (a) (22 NYCRR 1200.24 [a]) - failing to decline proffered employment if the exercise of his independent professional judgment on behalf of the client will be or is likely to involve him in representing differing interests.

Accordingly, in these circumstances, imputation is appropriate and disqualification of the McCarter is justified. *See generally, ABA Model Rules of Prof'l Conduct R. 1.10* (2003).

Access to this information disqualifies Berkower from representing Plaintiffs in this action and by virtue of DR 5-105(D), disqualifies his law firm as well.

The McCarter firm's defense of its decision to proceed with the representation of the Plaintiff, despite its recruitment of Berkower as a partner after this suit was brought, ultimately stems from the McCarter firm's assertion that any ethical improprieties can be cured by screening measures that were adopted to "screen" Berkower from the information regarding the present lawsuit, by creating what they described as a "Chinese Wall." First, "screening" is never mentioned in the Code as an antidote for an otherwise impermissible representation. The New York Code of Professional Responsibility does not recognize the use of screening devices except in cases involving former government lawyers or judges, *See*, 22 N.Y.C.R.R. § 1200.45(B) (codifying DR 9-101(B The absence of any mention of screening in other situations involving impermissible successive representations is telling and itself makes plain the clear position of the Code with respect to this issue. Second, the applicable authorities in this Circuit, as well as the courts of New York, hold that such screening measures will not prevent disqualification, particularly where the facts and circumstances present a discernable risk that the screening will not serve its intended goal of eliminating any risk of ethical violations, the inappropriate use or disclosure of confidential information and/or the appearance of impropriety. Furthermore, it does not protect client confidences from misuse in substantially related and adverse litigation; does not free the former client from any anxiety that matters disclosed to an attorney will subsequently be used against it in related litigation; and does not provide a clear and readily administered test, which would encourage self-enforcement among members of the legal profession. Thirdly, the McCarter firm's failure to timely implement any screening procedures justifies disqualification of Berkhower and the McCarter firm.

In *Kassis v. Teacher's Ins. and Annuity Assoc.*, 93 N.Y.2d 611 at 616 (Ct. App., 1999), the Court of Appeals discussed that attempted remedy of screening. In that case, the partner in charge of the litigation at issue assured the Court that (1) the entire file was being kept in his office rather than in the general filing area; (2) his office was a substantial distance from the associate in his firm who was being disqualified; (3) the associate was being instructed not to touch the file or to discuss the matter with any partner, associate, or staff member of the firm; (4) no meetings, conferences, or discussion concerning the matter would take place in the associate's presence; and (5) all future associates who may work on the matter would be instructed not to discuss the matter with the associate being disqualified. Nevertheless, the Court of Appeals held that the entire firm was disqualified.

In the instant case, the McCarter firm has taken no action to insure that Berkower does not have access to the file. More importantly, ten (10) months have passed and the McCarter firm has not informed the Defendants or this Court as to the precise steps it has taken to insure that Berkhower is entirely screened from any aspect of this case.

As in the instant case where the presumption of disqualification does arise and attorneys search for a way to rebut it, the Court in Kassis found that the party seeking to avoid disqualification must prove that any information acquired by the disqualified lawyer is unlikely to be significant or material in the litigation. Id. at 519. The information Berkower obtained regarding VV's business practices, finances and trade secrets (and attempts to protect them); its litigation practices, its financial situation, its attitude toward settlement, and most important the fundraising that is the basis for the alleged Federal jurisdiction in this case, is undeniably significant and material to this litigation.

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Similarly, the scholarly authorities on the subject all agree that screening should be rejected where, as here, the tainted attorney had an ***extensive relationship*** with the former client. *See*, Lee A. Pizzimenti, *Screen Virite: Do Rules About Ethical Screens Reflect the Truth About Real-Life Law Firm Practice*, 52 U. Miami L. Rev. 305, 334 (1997) (stating that screens are particularly inappropriate where the tainted lawyers had a ***material role*** in representing their former client); Tom Morgan, *Screening the Disqualified Lawyer: The Wrong Solution to the Wrong Problem*, 10 U. Ark. (Little Rock) L.J. 37, 52-53 (1987) (concluding that screening was appropriate only if the tainted lawyer realistically did not receive significant confidential client information (an approach which was utilized by the Second Circuit in *Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp.*, 518 F.2d 751 (2d Cir. 1975)).

In *Cheng v. GAF Corp.*, 631 F.2d 1052, 1058 (2d Cir. 1980), the Second Circuit recognized that, "[i]f after considering all of the precautions taken by the firm whose disqualification is sought this Court still harbors doubts as to the sufficiency of these preventive measures, then we can hardly expect [the former client] or members of the public to consider the attempted quarantine to be impenetrable." *Id* at 1058 (2d Cir. 1980), vacated on other grounds, 450 U.S. 903, 101 S. Ct. 1338 (1981). Based on this reasoning, the *Cheng* Court ruled that disqualification was necessary to "guard against the inadvertent use of confidential information" notwithstanding the fact that: (1) a screen had been implemented preventing the tainted attorney from any involvement in litigation against that attorney's previous client; (2) the tainted attorney worked in a department separate from the one in which the case at issue was being handled; and (3) the firm had submitted affidavits attesting that the tainted attorney had not worked on the matter and that he had not disclosed any confidential information or discussed the merits of the action with colleagues. Id. at 1057.

New York State authorities are particularly relevant since this disqualification motion ultimately turns on an evaluation of the Code. *See*, *Pastor v. Trans World Airlines, Inc.*, 951 F. Supp. 27, 30 (S.D.N.Y. 1996) (Glasser, J.); *Decora Inc. v. DW Wallcovering, Inc.*, 899 F. Supp. 132, 136 n. 4, 140 n. 9-10 (S.D.N.Y. 1995)(Koeltl, J.). Furthermore, Plaintiffs are proceeding with claims under the New York State law in addition to Rule 10B-5 of The Securities and Exchange Act of 1934, which, in the absence of 10B-5 claim, would be adjudicated in the New York State courts. In those courts, screening measures have consistently been met with skepticism and disapproval. *See, e.g.* *Solow v. W.R Grace & Co.*, 83 N.Y.2d 303, 313, 610 N.Y.S.2d 128, 135 (1994) ("If an attorney has represented a client in an earlier matter and then attempts to represent another in a substantially related matter which is adverse to the interests of the former client, the presumption of disqualification is irrebuttable."); Trustco Bank New York v. Melino, 164 Misc. 2d 999, 1004-1006, 625 N.Y.S.2d 803, 807-808 (N.Y. Sup. Ct. Albany County 1995) ("the impermeability of a Chinese Wall [is not] an attainable concept").

In cases where there is a weak connection between the prior representation and the current case, some Courts have explored the viability of screening. Although the connection here is particularly strong, we will still review the other factor those Courts consider, the size of the firm. Since it is particularly important that the Code of Professional Responsibility not be mechanically applied, the courts view size in terms of the number of attorneys working at one location, as opposed to the number of employees in the entire firm. In *re Del-Val*, 158 F.R.D. 270, the presumption of shared confidences was rebutted only upon the showing that in a firm of 400 attorneys, 300 worked in the New York office where the tainted attorney worked, thus reducing the possibility of inadvertent disclosure.

In the instant case, Charles Lee, Esq., the principal counsel for the Plaintiff from the McCarter firm, claims to be assigned to the Stamford, Connecticut office of the firm. However, Mr. Lee's Notice of Appearance filed of record in this case and appearing on PACER,, lists his New York address as his contact information and not the Stamford office. Moreover, on numerous occasions, members of the undersigned's firm have had conversations with Mr. Lee and his associates when they were working on this case out of the McCarter firm's New York office where Mr. Berkower is assigned. The McCarter firm, despite the fact that its total number of attorneys is around 400, has only 16 lawyers in its Stamford office and only 29 attorneys are located in the New York office (33 miles from Stamford). (See McCarter firm's website at http://www.mccarter.com). Furthermore, as reflected in the Affidavit of Barbara Engelke, all of the documents prepared at the McCarter law firm are available to any attorney or other personnel at the McCarter firm regardless of which office they work out of. These facts, coupled with the fact that email and Blackberrys make instant communication possible, makes it impossible to insure that Berkhower will be completely screened from the rest of the firm.

Consequently, in determining whether the screening measures are adequate in the context of the relevant number of the attorneys, the court should consider cases with discussion of firms of a smaller size. For example, in Decora v. DW Wallcovering, Inc., 899 F. Supp. 132, 140 (S.D.N.Y. 1995) (Koeltl, J.) the District Court disqualified counsel for defendants despite the firm's implementation of screening measures designed to isolate the tainted associate -- who had previously represented plaintiff in another action while with a different law firm -- from all communications relating to the case. The court reasoned that the relatively small size of the firm -- forty-four (44) attorneys in total -- and the associate's close working relationship with other attorneys in the department, created an unreasonable risk of disclosure. *Id.* at 140-141.

Numerous other federal and state courts in New York similarly have been persuaded that disqualification was warranted because of the relatively small size of the firm in question. *Kassis v. Teacher's Ins. & Annuity Assoc.*, 93 N.Y.2d 611, 618, 695 N.Y.S.2d 515, 519 (1999) (26 attorney law firm disqualified despite the implementation of screening measures); *Adams v. Lehrer McGovern Bovis, Inc.*, 208 A.D.2d 377, 617 N.Y.S.2d 9 (1st Dep't 1994) ("Regardless of the best efforts of the attorneys involved, the erection of an adequate internal barrier to prevent the possibility that confidential information concerning defendant could inadvertently flow from defendant's former counsel to the other attorneys at her new firm during the litigation of this ongoing matter is simply not possible, in light of the small size of the new firm, which employs only four attorneys."); *See also*, *Steel v. Gen. Motors Corp.*, 912 F. Supp. 724, 744 (D.N.J. 1995) ("Often a law firm will attempt to use screening measures to obviate a conflict of interest. This is not appropriate in this case. First, the smaller the firm, the less likely such screening measures will be effective. In several cases, courts have disapproved of screening measures," aff'd, sub. nom., Cardona v. GMC, 942 F. Supp. 968 (D.N.J. 1996).

Here as well, and for similar reasons, screening measures must be rejected as a means to avoid disqualification because they do not, and cannot, provide adequate assurances that conflict-of-interest concerns will be avoided. Given the size of the McCarter's firm New York office, even if combined with its Stamford office, as well as Berkower's experience and credentials, and the close proximity of the lawyers working on the CADA case, in addition to a centralized electronic information system and email access at the McCarter firm there is every reason to believe that Berkower's contact with McCarter's lawyers working on the CADA case has extended, and will extend, beyond the matters of which we have knowledge. In sum, there is simply no way to remove the risk that Berkower will come (or already has come) into contact with one or more of the attorneys assigned to this litigation and the associated risk of disclosure, inadvertent or otherwise, of VV client confidences; particularly when preparing for Berkowers anticipated deposition. Under these circumstances, it is patently unfair for VV to bear this enduring risk throughout the pendency of what may very well be a lengthy litigation. Finally , although Mr. Lee and Mr. Berkower are honorable men, as all of the attorneys of his firm are honorable people, (see Shakespeare's Julius Caesar Speech of Marc Anthony) the failure to timely provide any information regarding the conflict and the screening, calls into question any *nunc pro tunc* attempt to now assert what screening took place as of ten months ago.

In the instant case, the Defendants will never know exactly what confidential information has already been disclosed in the past ten (10) months. *See*: Tom Morgan, *Screening the Disqualified Lawyer: The Wrong Solution to the Wrong Problem*, 10 U. Ark. (Little Rock) L.J. 37, 54 (1987) ("The problem with [screening] ... is simply that a client can often never know for sure when or whether his confidence has been abused. That the trustworthy must suffer for the sins of the rest is unfortunate, but client confidence must be the key."); Monroe Freedman, *The Ethical Illusion of Screening, Legal Times*, Nov. 20, 1995 ("The traditional conflict-of-interest rules on switching sides were designed to protect the former clients' confidences, even at the expense of reducing lawyers' employment [sic] mobility. The evasion of these rules through screening jeopardizes client confidences in order to increase lawyers' job opportunities. This, of course, makes a mockery of the claim that the law is a profession and not a business.... We can only hope that screening is an idea whose time has come to nothing.").

The text of the Code, the policy interests underlying the ethical rules pertaining to client confidences and the appearance of impropriety, and the underlying equities, all compel the conclusion that, rather than causing VV to endure the risk that screening measures will not be 100% effective, responsibility should be placed with those who created the conflict situation in the first place. As discussed above, this conflict did not arise inadvertently, or after the fact. The McCarter firm had the opportunity to withdraw from this representation. They chose not to do it and therefore disqualification is warranted.

Furthermore, the disqualification is unlikely to materially prejudice plaintiffs since the litigation is at the early pleading stage (Plaintiff has filed an Amended Complaint and a response has been stayed pending the outcome of this Motion) and no discovery has been propounded or responded to. *See, e.g.*, Field-D'Arpino v. Restaurant Assoc., Inc., 39 F. Supp. 2d 412, 415 n.3 (S.D.N.Y. 1999) (Pauley, J.) (finding "that the disruption and delay attendant to displacing an attorney of record is mitigated here because discovery has not begun"); *United States v. Uzzi*, 549 F. Supp. 979, 984 (S.D.N.Y. 1982) (Sand, J.) (observing that "neither the defendant nor challenged counsel have a considerable investment in the retention in this proceeding"); *Decora v. DW Wallcovering, Inc.*, 899 F. Supp. 132, 141-1422 (S.D.N.Y. 1995) (Koeltl, J.) (reasoning that because plaintiff moved for disqualification at the outset of the litigation, defendants did not lose the benefit of longtime counsel's specialized knowledge of its operations and did not incur an unduly burdensome loss of time and money in being compelled to retain new counsel (citing *Gov't. of India v. Cook Indus., Inc.*, 569 F.2d 737, 739 n.11 (2d Cir. 1978)).

Therefore disqualification should be ordered as the small potential of harm to the Plaintiff is clearly outweighed by the actual and apparent harm posed to the defendants through the very real violation of the policies underlying the code.

Perhaps the crucial issue in this instant case is the ease with which the information is accessed by the attorneys of the firm. Despite the size and structural divisions of the McCarter Firm, as well as different physical location of the various departments, in the age of electronic technology, where information is stored on computers which can be accessed by persons throughout a firm, client information can no longer be guaranteed to be kept confidential within a section. See: Cobb Publishing, (At the hearing, in answering the Court's question as to whether someone from another section could access information on the commercial litigation group's computers re Cobb v. Hearst, the attorney representing the disqualified firm answered: "If one wanted to, they could." (Curtner, Hearing, PP. 36-37). This is a compelling reason for requiring a comprehensive firm-wide screen in place a the moment an "infected" attorney joins the firm. Cobb Publishing v. Hearst Corp., 907 F. Supp. 1038, 1046 (E.D. Mich. 1995). And that was case was decided 13 years ago.

As outlined in the Affidavit of Barbara Engelke, the McCarter firm has a central, document retrieval system that is accessible by every attorney in the firm, no matter which office. The McCarter firm's argument may be that today's technology is more sophisticated, however, the fact that there are still 500 Berkower emails stored on hardware and that he more likely than not printed or saved, speaks for itself. Most importantly, however, is that neither we nor this Court is aware of any screen that may have been implemented and there is no way to "undo" what has been done since Berkhower joined the firm more than ten (10) months ago.

CONCLUSION

For the foregoing compelling reasons, VV's motion to disqualify McCarter & English, LLP should be granted, and the Court should direct that the McCarter firm should be disqualified forthwith from any further representation of the Plaintiff and that the Plaintiff be afforded a reasonable time to obtain new counsel and any other relief the Court deems proper.

Dated: September 2, 2008
Boca Raton, Florida

Respectfully submitted,

s/ Jan Michael Morris

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CERTIFICATE OF SERVICE

I certify that on September 2, 2008, a true and correct copy of the foregoing Motion to Disqualify McCarter & English, LLP was electronically filed and served by facsimile on all counsel or parties of record on the service list.

s/ Jan Michael Morris

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SERVICE LIST
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